Recreational Boating Committee of The Maritime Law Association of the United States

BOATING BRIEFS

Thomas A. Russell, Chairman **Frank P. De Giulio, Editor**

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This journal will summarize the latest cases and other developments which impact the recreational boating industry. We welcome any articles of interest or suggestions for upcoming issues.

- The Editorial Staff

In This Issue

Court Rejects Challenge To Local Ordinance Banning Jet Skis

In July, 2002, the California Court of Appeal upheld a Marin County ordinance prohibiting the use of personal watercraft ("PWC"), generically known as "jet skis," on "all waters within the territory of the County of Marin accessible from a shoreline." *Personal Watercraft Coalition v. Board of Supervisors*, 100 Cal.App.4th 129, 122 Cal.Rptr.2d 425 (Ct. App. 2002).

The 1999 Marin County Ordinance defines a PWC as "a vessel...that is less than twelve feet in length, propelled by machinery, that is designed to be operated by a person sitting, standing, or kneeling on the vessel, rather than in the conventional manner of sitting or standing inside the vessel." The ordinance defines the prohibited use area as "all waters within the territory of the County...accessible from a shoreline, or the farthest extension of the shoreline of Marin County as defined by its landmarks ...includ[ing] the shoreline of the Pacific Ocean...the San Francisco Bay shoreline...all estuaries, rivers and bays...[and] a distance of 7 miles inland from the mouth of the rivers or navigable creeks." By its own terms, the ordinance amounts to an absolute prohibition of PWC use on or within waters bounded by County land, including portions of the Pacific Ocean and San Francisco Bay. Violation of the ordinance is a summary criminal offense, subjecting violators to fines of $100 to $500.

We have previously reported on litigation arising from restrictions imposed by the federal government on

continued on page 2

continued from page 1

PWC use within certain national parks and recreation areas. See, 10 Boating Briefs No. 1 (Spring/Summer 2001) and 11 Boating Briefs No. 2 (Fall/Winter 2002).

Various plaintiffs filed suit against the County seeking to have the ordinance declared unconstitutional and unenforceable under both California and federal law. The trial court granted judgment in favor of the plaintiff-challengers on the grounds that the ordinance was void for vagueness. Specifically the trial court concluded that PWC users could not readily ascertain the boundaries of the waters were use was prohibited based on the text of the ordinance and, therefore, had no reasonable means to avoid a violation of the ordinance. The trial court therefore concluded that the ordinance was unconstitutional and void.

The County appealed the trial court's decision to the California Court of Appeal. In a lengthy decision the Court of Appeal discussed and rejected numerous arguments advanced by the challengers for invalidation of the ordinance under both California and federal law.

The challengers' primary argument was that the ordinance was unconstitutionally vague under California law because PWC users could not readily ascertain the boundaries of the waters where use was prohibited in order to avoid those areas and the potential fines imposed by the ordinance. In support of their argument the challengers submitted a map of the waters in and around Marin County which divided the waters into numerous segments corresponding with governmental jurisdiction. The map showed a "checkerboard" of geographic areas bordering the County over which the federal government, the State of California, Marin County and individual incorporated cities and towns within the County have either shared or exclusive jurisdiction. The challengers also offered uncontradicted evidence that there were no buoys, signs or other physical markers to identify the specific waters within the jurisdiction of the County where PWC use was prohibited. In these circumstances the challengers argued that it was impossible for a PWC operator to identify and avoid the areas where use is prohibited by the ordinance.

In rejecting the challengers' vagueness argument the Court of Appeal relied heavily on the fact that none of the plaintiffs had been charged with a violation of the ordinance in question. In those circumstances the Court held that the lawsuit did not present an issue of whether the ordinance was unconstitutional as applied in a particular case, but rather, whether the ordinance was impermissibly vague on its face and thus void in its entirety. The Court of Appeal held that in such circumstances the statute must be presumed to be valid on its face unless there is no conceivable factual situation in which the law could be constitutionally enforced. Applying this standard, the Court reasoned that the jurisdictional map submitted by the challengers demonstrated that an individual seeking to avoid violation of the ordinance could in fact ascertain the boundaries of the prohibited use areas by reference to other statutes and documents. Further, the Court noted that the challengers did not argue that the portion of the ordinance making the prohibition applicable to "rivers or creeks" was unclear or uncertain, thus impliedly admitting that this portion of the ordinance was valid under the vagueness test.

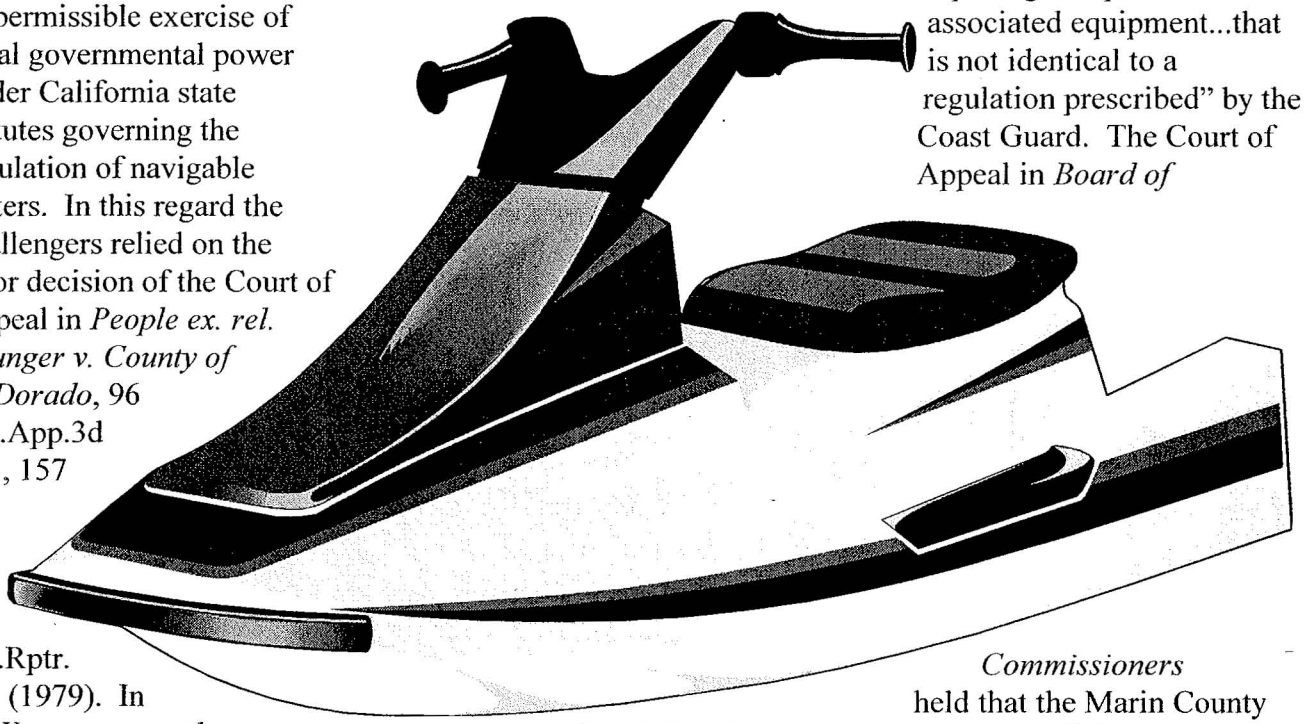
Although the Court of Appeal rejected the challengers' vagueness argument as presented, the Court left open the

continued on page 3

continued from page 2

possibility of a future challenge by a person charged with a violation of the ordinance if the County does not erect or install buoys, signs or other markers to identify the waters where PWC use is prohibited.

The challengers argued in the alternative that the county ordinance was an impermissible exercise of local governmental power under California state statutes governing the regulation of navigable waters. In this regard the challengers relied on the prior decision of the Court of Appeal in *People ex. rel. Younger v. County of El Dorado*, 96 Cal.App.3d 403, 157 Cal.Rptr. 815 (1979). In the *Younger* case, the court held that a county ordinance making it illegal to "float, swim or travel...by artificial means" on a portion of the American River used by the public for whitewater rafting was an unreasonable and impressible exercise of the county's police power. Faced with this argument, the court in *Board of Commissioners* distinguished the ordinance at issue in the *Younger* case on the basis that it effectively prohibited all available recreational uses of the river. In contrast, the Marin County ordinance banning PWC use is limited to a single and specific use of its waters and is based on a finding by the County that PWC use was incompatible with other recreational activities such as swimming, surfing, kayaking and canoeing. The Court found that the California Harbors and Navigation Code did not preempt all local regulation of navigable waters and that the Marin County ordinance was a reasonable exercise of the limited powers granted to local governments by the state statute.



As a further alternative argument the challengers took the position that the county ordinance was preempted by federal law, specifically the Federal Boat Safety Act. The FBSA, 46 U.S.C.A. §§ 4301-4311, provides that "a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment...that is not identical to a regulation prescribed" by the Coast Guard. The Court of Appeal in *Board of Commissioners* held that the Marin County Ordinance did not purport to propose any standards for vessels or equipment within the meaning of the federal statute and that the FBSA does not prevent state or local governments from simply restricting or prohibiting the use of recreational craft.

Breach Of Captain Warranty Voids Coverage

In *Yu v. Albany Insurance Company*, 2002 AMC 660 (9th Cir. 2002) the Ninth Circuit Court of Appeals held that Underwriters had expressly reserved the right to approve any change of the identity of the vessel's captain in their marine policy and therefore owed no coverage for the sinking of the vessel while under the command of a non-approved individual, despite the absence of any causal connection between the warranty breach and the casualty. The Court affirmed the district court's grant of summary judgment in favor of Albany.

When Jacinta Yu, Eric Yu and the AAS Corporation (the Yus) purchased the vessel *Liberty*, they approached a broker, Ocean Marine Insurance Agency to obtain insurance. The agent, through its employee Patrick Kudlich, purchased a policy that was underwritten by Albany Insurance Company. The Albany policy contained a "Captain Warranty" which stated as follows: "It is understood and agreed that the Captain of the vessel is Gregory P. Walker, and it is warranted by the Assured that Gregory P. Walker shall be aboard at all times the vessel is navigating. If Gregory P. Walker is not aboard the vessel while it is navigating, and if Underwriters have not previously agreed to a suitable replacement, coverage under this policy shall be suspended until Gregory P. Walker returns to the vessel."

Kudlich sent the policy to the Yus along with a cover letter in which he advised them to review the policy, particularly the Captain Warranty. The letter stated as follows: "The Captain Warranty is very important, that you must tell me the name of any new captain that replaces Greg Walker prior to the new captain operating the vessel. Failure to abide by this warranty could null and void the insurance policy."

A month later, the Yus orally requested the broker to add another captain. Kudlich requested the new captain's resume which was forwarded to and approved by Albany. Albany issued a policy endorsement confirming that the new captain was an "additional approved operator."

Eleven months later the *Liberty* sank of the coast of Hawaii. At the time of the sinking neither of the previously approved captains were aboard. Jorge Perez was at the helm. When the Yus tendered the claim to Albany, Albany refused to pay on the grounds that it had not approved Perez as a captain and that the Yus had therefore breached the policy's Captain Warranty.

The Yus argued that they had complied with the warranty and were entitled to coverage. Although denied by Kudlich, Eric Yu claimed that he had left a telephone message on the broker's answering machine indicating that Jorge Perez was to be the new captain of the *Liberty* in July, 1997, six months before the sinking. For the purposes of Albany's summary judgment motion, the court accepted the Yu's contention as true.

The district court granted summary judgment in favor of Albany. The court held that the Yus had failed to comply with the policy's requirement that they obtain Albany's approval of any new captain in order to maintain coverage on the *Liberty*. Therefore, coverage was suspended at the time of the sinking.

On appeal the Yus argued that the district court should not have granted summary judgment in favor of Albany because the Captain Warranty was ambiguous or inconspicuous, that the prior course of dealing negated the terms of

continued on page 5

continued from page 4

the warranty and that there was no evidence that their alleged breach of the warranty was causally related to the sinking of the vessel.

The Ninth Circuit held that the Yus did not comply with the Captain Warranty because its plain language required that Albany agree to a replacement captain in order for coverage to be effective. It was undisputed that Albany did not agree to Captain Perez as a replacement. A telephone message to the broker did not meet the requirements of the warranty.

The Ninth Circuit also rejected the appellant's contention that the Captain Warranty was ambiguous or inconspicuous and therefore unenforceable. The Court found that there was nothing ambiguous about the statement "coverage under this policy shall be suspended until [an approved captain] returns to the vessel." The policy's Captain Warranty was printed in bold, underlined and in capital letters. The approved Captain's name was typed in a different font filling in a blank line. The broker's cover letter called attention to the Captain Warranty and further warned the Yus that failure to comply with the requirements of the warranty could void the policy.

When the Yus sought approval of a new captain a month after the policy was issued, Albany approved the request and agreed that the coverage for the replacement captain would be retroactive for six weeks. The Yus contended that Albany had therefore waived its requirement for agreement to a replacement captain in the warranty by extending coverage retroactively. The Court rejected the Yu's argument, finding that the Yus' position would mean that the insured had unbounded discretion to choose any replacement captain without first obtaining the Underwriters' agreement.

On appeal the Yu's also argued that summary judgment was improper because Albany had submitted no evidence of any causal connection between the alleged breach of the Captain Warranty and the sinking. Further, the appellant argued that the issue of whether proof of a causal connection between an alleged breach of warranty and a loss is necessary to void coverage should be governed by Hawaiian rather than federal law. In granting summary judgment the district court found that the issue was governed by an established federal maritime law rule which does not require proof of causation in breach of warranty cases. Although recognizing that the courts of Hawaii had not addressed the issue, the Ninth Circuit held that the state would adopt a rule that breach of a policy warranty voids coverage regardless of causation if confronted with the issue. Accordingly, the Court held that the Yu's breach of the Captain Warranty voided coverage in the absence of any proof that the breach was related to the sinking, regardless of whether federal maritime or state law applied.

In its holding the Ninth Circuit underscored the importance of a captain's warranty in a marine insurance policy: "Like warranties concerning navigation, the captain's warranty permits the insurer to control the amount of risk that it assumes, and the insured thereby to secure a reasonable premium. To inject a requirement of loss causation would lead to uncertainty in determining the obligations of the parties, and would make coverage depend on highly hypothetical determinations of causation. Thus it is not unreasonable to permit the parties to insert and enforce a captain's warranty in a marine insurance policy."

(The Editor wishes to thank Lyn N. Kagey, Esq. for contributing this article).

Insurer Not Entitled To Summary Judgment Based On Misrepresented Purchase Price

In 1999, Massachusetts residents Alain Hanover and his son Daniel decided to purchase a classic yacht. The father saw an advertisement for *Stiarna*, a 1937 Camper & Nicholson yacht, on the website of Authentic Yacht Brokerage. The advertisement specified an "asking price" of $250,000. According to the website, $800,000 had been spent on refurbishment since the 1980s and she had been "carefully maintained" and was "85% of excellent." The yacht broker provided Hanover with a 1999 survey of the vessel which identified certain deficiencies in the hull, rigging and engine but concluded that most of the systems were in "very good" or "excellent" condition.

The yacht was located in Trinidad and the Hanovers traveled there to conduct a personal inspection and sea trial in January, 2000. They also spoke to the boatwright who had maintained the yacht in Trinidad. Based on their inspection, review of the 1999 survey and discussions with the boatwright, the Hanovers offered to pay $130,000 for *Stiarna* and the offer was accepted. At that time the Hanovers estimated that an expenditure of $250,000 would be required for initial refitting to replace the engine and to renew various steel structural members and hull timbers. They also estimated that an additional $450,000 would be required to refurbish the yacht's interior accommodations. The Hanovers made arrangements for the initial refitting work to be done at a shipyard on the neighboring island of Grenada.

The Hanovers submitted a copy of the 1999 survey and an application for insurance to a Canadian marine insurance broker to obtain insurance on *Stiarna*. The application form contained a notice advising the applicant that the information provided therein would be relied on by the insurer and that any misrepresentations could void coverage. Alain Hanover completed the application and stated that the purchase price was

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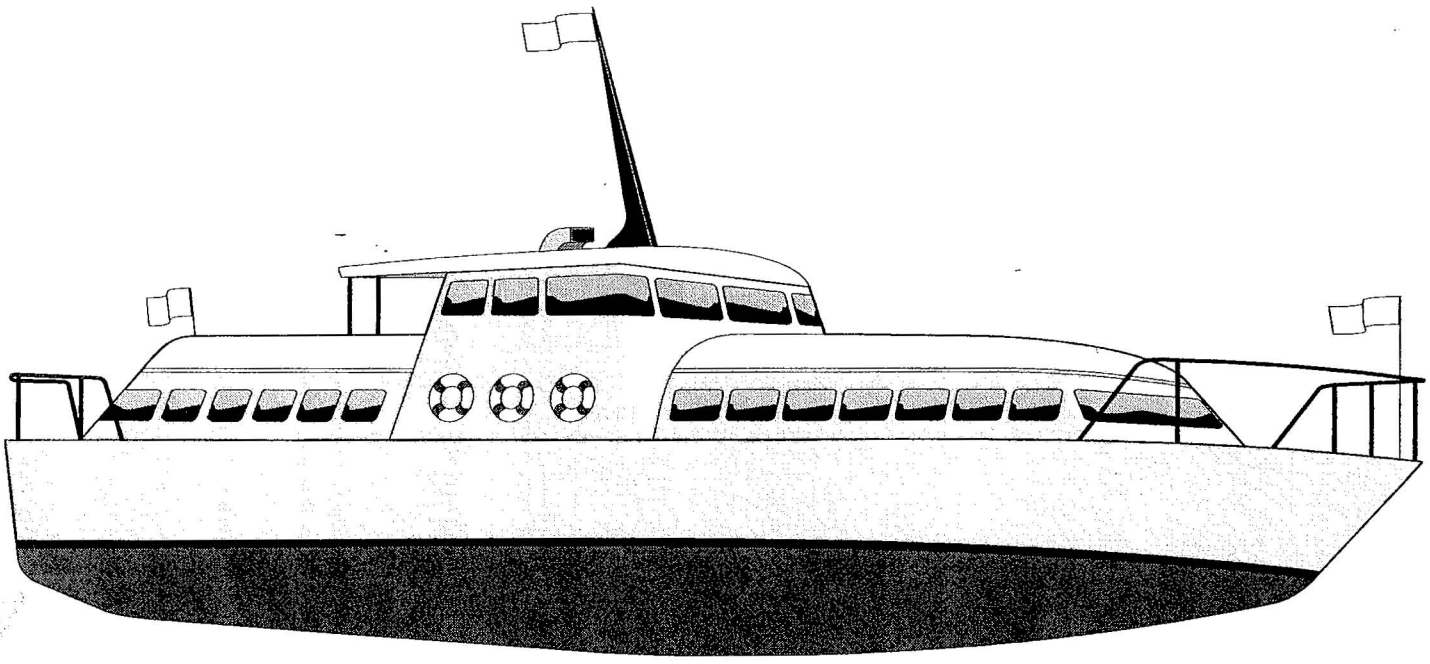

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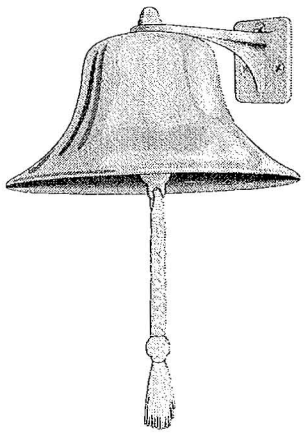
$150,000, twenty thousand dollars more than the agreed purchase price. There was evidence that Hanover told the insurance broker that although he had paid $130,000 for the yacht, he expected to spend an additional $20,000 to prepare *Stiarna* for the initial voyage from Trindad to Grenada for refitting and therefore sought hull insurance for the increased figure. There was no indication that the broker passed this information to the insurance underwriters. Based on the 1999 survey, the insurance application and additional information provided by the broker, Reliance National agreed to provide hull and crew liability coverage for *Stiarna* subject to the condition that a new out of water survey be completed "after refit and prior to voyage to Boston." The broker confirmed the binder on February 3, 2000 and advised Reliance that the boat would leave Trinidad on February 20th for Grenada where the refit work would occur.

The Hanovers hired a professional captain for the voyage from Trindad to Grenada. At the recommendation of the captain they also arranged for a commercial power boat to accompany them on the voyage. *Stirana* departed Trinidad on February 23rd. An hour after departure an engine fire broke out. *Stirana* was abandoned and sank on the same date.

Following the loss Reliance hired a surveyor to investigate the sinking. In April, 2000, the surveyor advised Reliance of his opinion that the sinking was wholly fortuitous, that all defects had been disclosed to the underwriters and that the sinking was not related to any of the known deficiencies.

Thereafter Reliance filed a declaratory judgment suit in the U.S. District Court for the District of Massachusetts in admiralty seeking a declaration that no coverage was owed in connection with the loss due to the alleged unseaworthiness of *Stiarna* and Hanover's alleged misrepresentation of the purchase price. The Hanovers filed a counterclaim for breach of contract, unjust enrichment and bad faith.

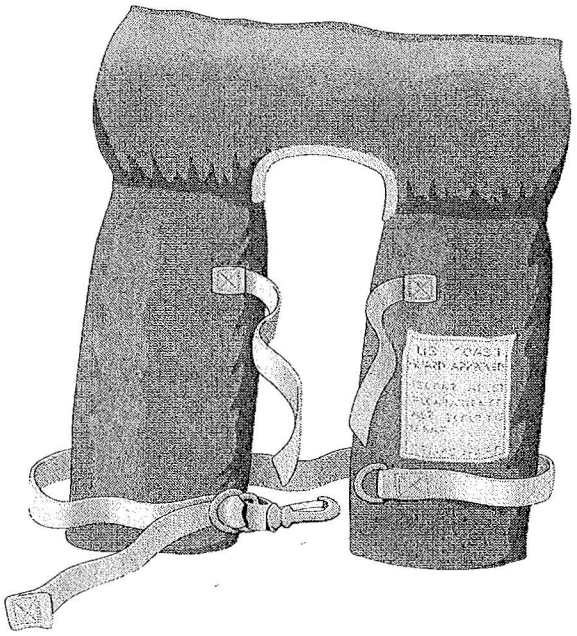
Reliance filed a motion requesting the Court to grant summary judgment in its favor and to declare the policy void based on the undisputed fact that Alain Hanover had represented that he paid $150,000 for *Stiarna* when in fact the agreed purchase price was $130,000. Reliance claimed that summary judgment was proper under the marine insurance doctrine of *uberimmae fidei* or utmost good faith. The Hanovers filed a cross motion for summary judgment arguing that they were entitled to a finding that the coverage was effective because they had fully disclosed the vessel's condition to the underwriter and the $20,000 purchase price discrepancy was immaterial to the underwriter's evaluation of the risk. In *Reliance National Insurance Company (Europe) Ltd. v. Hanover*, __F. Supp. 2d __, 2002 WL 1611612 (D.Mass.), the district court denied both motions for summary judgment. The court concluded that the issues of whether the purchase price discrepancy was material to the underwriter's risk and whether the Hanover's disclosures concerning the condition of the yacht satisfied their obligations of utmost good faith were disputed issues of fact which could only be resolved at trial by the fact finder.



Parental Immunity Doctrine No Bar To Contribution Claims Against Father Of Injured Child

In September, 1997, Charles Szollosy, a minor, was injured as a result of a jet ski accident while vacationing with his parents at the Hyatt Regency Resort in the Cayman Islands. Prior to the incident Charles and his father approached several idle jet skis floating near a watercraft rental concession on the Resort's beach. According to a Complaint filed on behalf of the child by his mother, the jet skis were moored and their engines were not turned on. The Complaint alleged that the father seated his son on one of the jet skis which suddenly propelled forward with the child aboard. The jet ski collided with a breakwater causing Charles to be thrown over the handlebars. Charles struck the breakwater and sustained permanent injuries. Mrs. Szollosy filed suit against the Hyatt Resort and the watercraft concessionaire alleging negligence, breach of warranty and products liability claims in the U.S. District Court for the District of Connecticut.

Thereafter the defendants filed a Third Party Complaint against Mr. Szollosy for contribution or indemnity, alleging that his negligence caused or contributed to the accident. Mr. Szollosy filed a motion to dismiss the Third Party Complaint on the grounds that the defendants' claim was governed exclusively by Connecticut State law and that the State's parental immunity statute barred the defendants' claims against him. In *Szollosy v. Hyatt Corp.*, 208 F.Supp.2d 205 (D.Ct. 2002), the district court denied the father's motion to dismiss, finding that the neither federal maritime law nor Connecticut State law shielded Mr. Szollosy from potential liability to the defendants in the circumstances.



In response to the father's motion to dismiss the defendants argued in the alternative that: (1) the claims were governed by federal maritime law which precluded the application of a state parental immunity statute; (2) that maritime choice of law principles required application of Cayman Islands substantive law on the issue of parental immunity, and; (3) even if Connecticut law applied, its parental immunity statute is inapplicable to tort claims involving the negligent operation of a vessel. Both the plaintiff and Mr. Szollosy took the position that federal maritime law was inapplicable to the lawsuit because the tort claims arising from the incident did not fall within the court's admiralty jurisdiction or, alternatively, because maritime choice of law principles would require the court to apply Connecticut substantive law on the issue of parental immunity.

In its opinion the district court first considered Mr. Szollosy's argument that the claims did not fall within the court's admiralty subject

continued on page 9

continued from page 8

matter jurisdiction. Mr. Szollosy and the plaintiff argued that the defendants could not invoke admiralty jurisdiction in connection with their third party claims because the plaintiff brought its Complaint subject to the court's diversity of citizenship jurisdiction and the defendants does not expressly identify their claims as maritime claims in the Third Party Complaint. The district court found that admiralty subject matter jurisdiction did not depend on the presence or absence of a specific statement in the pleadings and that federal maritime law would apply to the case despite the plaintiff's reliance on diversity jurisdiction if the incident giving rise to the claims satisfied the test for admiralty tort jurisdiction.

The court applied the "situs" and "nexus" tests for admiralty tort jurisdiction in accordance with the U.S. Supreme Court's decisions in *Gerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043 (1995) and *Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892 (1990) to the facts of the case. The district court found that the jet ski accident clearly satisfied both prongs of the Supreme Court's test because the accident occurred on navigable waters, the incident and subsequent rescue had the potential to disrupt maritime commerce and the activity in question, the operation of a vessel in navigable waters, had a substantial relationship to traditional maritime activity.

Having concluded that admiralty jurisdiction was present, the district court addressed the parties' choice of law arguments to determine whether the third party claims should be governed by federal maritime law, Cayman Islands' law or Connecticut State law. At the outset of its discussion the court noted that because the incident occurred in foreign waters the maritime choice of law rules established in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921 (1953) would ordinarily require an evaluation of whether United States maritime law or Cayman Islands law should apply. However, based on the submissions of the parties the court found that there is no recognized doctrine of parental immunity under either federal maritime law or the laws of the Cayman Islands. Accordingly the court concluded that it was unnecessary to conduct a choice of analysis in the absence of an actual conflict between the U.S. and foreign laws.

The district court then considered whether it must look to Connecticut law on the subject of parental immunity. The court noted that state law may apply in certain maritime cases if the state law does not contravene an established principle of federal maritime law and the court is satisfied that application of the state law will not impair the uniform application of maritime law principles. The court found that while federal maritime law clearly recognizes the right of a defendant to assert claims for contribution and indemnity against another potential tortfeasor, it does not include any established principle addressing the issue of parental immunity. Accordingly, the court concluded that the maritime choice of law rules required it to determine whether Connecticut law addressed the issue of parental immunity and, if so, whether application of the state law

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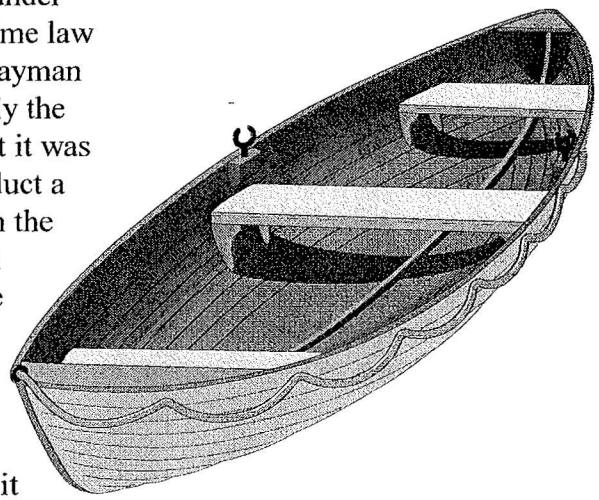

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would impair the uniformity of federal maritime law.

The district court found that Connecticut law generally recognizes the doctrine of parental immunity. The Connecticut courts have held that the doctrine not only bars a minor child from suing his or her parents for personal injury but also applies to bar third party actions against parents for contribution or indemnity. However, the district court found that Connecticut has statutorily abrogated the parental immunity doctrine in cases arising from a parent's alleged negligence "in the operation of a...vessel." The court observed that the Third Party Complaint against Mr. Szollosy alleged in part that he caused or contributed to the child's injuries by causing the jet ski to start. The court reasoned that this allegation related to the negligent operation of a vessel for which parental immunity is abrogated by statute under Connecticut law.

In the circumstances the district court concluded that the doctrine of parental immunity was not available to shield Mr. Szollosy from potential liability regardless of whether the issue was governed by federal maritime law, Cayman Islands law or Connecticut law.

Regulatory Developments And Other Recent Cases Of Interest

Personal Floatation Devices for Children On June 24, 2002, the Coast Guard published an Interim Rule amending 33 C.F.R. § 175 making it unlawful to operate a recreational vessel unless children under 13 years of age are wearing personal floatation devices ("PFD's") when above deck on a vessel underway. 67 Fed. Reg. 42488. The requirements imposed by the Interim Rule become effective on December 23, 2002. The Coast Guard had previously issued a Final Rule on the same subject in February, 2002. The Final Rule was withdrawn prior to its effective date when the Coast Guard discovered potential conflicts with State laws requiring PFD's for children. The Interim Rule seeks to eliminate the conflicts by making the federal regulation applicable only in those States or U.S. Territories which have not enacted PFD requirements for children. The requirement also applies to U.S. owned vessels operating on the high seas. The federal regulation adopts the individual State requirements in those States which have PFD requirements for children. To find out if your State has a regulation requiring children to wear PFD's you may wish to refer to the Reference Guide to State Boating Laws (6th ed.) published by the National Association of State Boating Law Administrators ("NASBLA"). That publication as well as a wealth of additional information concerning State boating laws is available through NASBLA's website at www.nasbla.org.

Coast Guard Safety Alert. The Coast Guard's Office of Boating Safety has issued an advisory to recreational boaters warning of dangers posed by gasoline-powered generator exhaust. The Coast Guard has advised operators to turn off gasoline powered generators with transom exhaust ports when swimmers are in the water due to the danger of Carbon Monoxide poisoning. The Coast Guard has determined that the levels of Carbon Monoxide produced by generators present a potentially lethal risk to swimmers, particularly on boats which are designed with a cavity between the aft swim platform and the boat's transom. The full text of the advisory is available on the Coast Guard Office of

continued on page 11

continued from page 10

Boating Safety website, www.uscgboating.org.

Security Issues for Recreational Boaters. Captain Scott Evans, Chief of the Coast Guard's Office of Boating Safety, issued a statement to recreational boaters regarding security issues in the aftermath of the World Trade Center attack. The Captain's statement includes various security guidelines and recommendations for recreational boaters. Pleasure boat owners should keep in mind that federal law provides for a 100 yard security zone around all military or commercial cargo vessels. The operator of a pleasure boat who enters a vessel security zone is subject to criminal prosecution under federal law with penalties of up to six years in prison or a $250,000 fine. The full text of Captain Evans' statement is available at www.uscg.mil/news.

NASBLA Releases 2001 Boating Accident Study. The National Association of State Boating Law Administrators has issued the results of its 2001 survey of recreational boating accidents. According to the survey the number of fatalities continues to decline, dropping to what is said to be a record low of 695 deaths in 2001. The study indicates that the highest number of reported deaths from recreational boating was 1,750 in 1973. According to the accident statistics compiled by NASBLA, fully four out of five fatalities in 2001 occurred on boats less than 26 feet in length. The study concludes that forty-five percent of all reported injuries involved open motorboats. Thirty-six percent of all injuries were associated with Personal watercraft or "jet skis." The survey includes a state by state summary of fatalities and is available on the NASBLA website, www.nasbla.org.

Jurgensen v. Albin Marine, Inc., 214 F.Supp.2d 504 (D. Md. 2002). Owners of new Albin 33 Express Trawler sued manufacturer and seller after vessel sank in the Chesapeake Bay six months after purchase. The owners sought compensatory damages for loss of the vessel based on theories of negligence, products liability, breach of contract and breach of warranty. In addition, the Complaint also sought punitive damages against the manufacturer on the grounds that Albin was aware of the defects which caused the sinking but failed to take corrective action. Albin moved for summary judgment seeking dismissal of the punitive damage claims. The district court held that federal maritime law governed the availability of punitive damages as to all claims other than the breach of warranty claims which were subject to Maryland State law. Rejecting the reasoning of a number of federal courts which have concluded that punitive and other non-pecuniary damages are generally not available under maritime law in the wake of the U.S. Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), the district court chose to follow the reasoning of other courts which have limited the maritime rule barring punitive damages to cases involving seamen. Although the *Jurgensen* court held that punitive damages could be awarded in the circumstances of the case, the court held that Albin was entitled to summary judgment and dismissal of the tort-based punitive damage claims because the plaintiffs could not prove that Albin acted with intentional, wanton or reckless disregard for the rights of the plaintiffs. Similarly, the court held that Albin was entitled to dismissal of the warranty-based punitive damages

continued on page 12

continued from page 11

claims under Maryland law which requires proof that a defendant acted with "actual malice."

McMellon v. U.S., 194 F.Supp.2d 478 (D.W.Va. 2002). Plaintiffs sued the United States under the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.*, ("SIAA") to recover for personal injuries allegedly sustained in August, 1999, when their boat went over the Robert C. Byrd dam. The dam is owned by the United States and operated by the U.S. Army Corp of Engineers. The Army Corp had removed a series of warning buoys above the dam during a rehabilitation project in 1995. The buoys were not replaced after the project was completed. The plaintiffs also alleged that they did not see warning signs installed along the banks of the river above the dam because the signs were obscured by vegetation. The U.S. moved to dismiss the suit on the alternative grounds that the government was immune from suit or that the government did not breach any duty owed to the plaintiffs. The government argued that it was immune from suit because claims brought under the SIAA are subject to the discretionary function doctrine contained in the Federal Tort Claims Act, 28 U.S.C. § 2680. The district court concluded that although there is a split of authority on the question among federal courts, the Fourth Circuit Court of Appeals does not recognize the FTCA discretionary function doctrine in SIAA cases. Accordingly the district court denied the government's motion to dismiss based on sovereign immunity. However, the district court concluded that the U.S. was nevertheless entitled to summary judgment because the Corp of Engineers breached no duty owed to the plaintiffs. Specifically the court found that the Corp had no duty to place warning buoys on the river and could therefore have no liability for its decision to remove the buoys. The court recognized that the government can have liability if it undertakes a duty to warn boaters of hazardous conditions. However, in the case of warning signs the court concluded that liability can arise only if the warnings are misleading. In this case there was no allegation that the signs were misleading. As a result the court found that the U.S. could not have liability for failing to trim vegetation which allegedly obscured the otherwise proper warning signs.

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